No. 628

In the Supreme Court of the United States

OCTOBER TERM, 1942

INTERSTATE COMMERCE COMMISSION, J. M. KLEIN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, AND ILLINOIS CENTRAL RAILWAY COMPANY, APPELLANTS

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

ON REARGUMENT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

MAY 1943.

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FOREWORD

This case was argued April 7 and 8, 1943, and on April 19, 1943, was, by order of the Court, restored to the Docket for reargument with the request that counsel, on the reargument, direct their attention particularly to the following questions:

(1) Is freight tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?

(2) Assuming that this question is answered in the affirmative, would the cancellation of this tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes?

(3) What considerations of law, procedure or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustment of rates as between respondent and other carriers?

(4) Have the courts power to require the Commission to take such procedure?

This brief adopts, and respectfully refers the Court to the Commission's earlier brief, for the statement of the case and for argument in respect of question (1) except as herein supplemented, and covers under separate headings questions (2), (3) and (4).

(1) Is Freight Tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?

As shown in the preliminary statement of the Commission's earlier brief, the appellee railroad, whose line extends from Columbus, Mississippi,

across the State to Greenville, Mississippi, serves together with other railroads certain mill points where cottonseed transported from country origins in Mississippi and other States is processed into products which subsequently are transported to marketing destinations. In 1931, for purposes of meeting truck competition, the appellee and the other railroads (and, in fact, all railroads in Mississippi and nearby States) established so-called cut-back tariffs, whereunder each road provided for a rate-refund on inbound shipments of seed hauled by it to the mill points upon the condition that the outbound shipments of processed products be made via its line, the proffered refund being in the case of each road similarly computed and based on the weight of the inbound shipment and length of haul from origin to mill point (R. 9, 59).[1] The outbound rates on the products, local and joint, were "one level" rates, but, in order to become entitled to the refund on his inbound shipment of seed, the shipper had to reship via the same road which hauled the seed to the mill point, making proof of this by presentation of paid inbound freight bills.[2] Despite this condition, however, it will be seen that, under the said uniform cut-back tariffs, the rates on seed from origins equally distanced from the mill points were the same regardless of the road

[1] Item 5 (d) and item 40 of Tariff No. 81, R. 7.

[2] Item 40 of Tariff. R. 7, 57, 58.

inating and hauling inbound, and, as coupled
the outbound rates on the products, the same
any of the roads, resulted in an entirely uni-
n basis of rates. While the appellee railroad
not at the time offer a cut-back reduction in
inbound rates on seed of the other roads con-
ned upon the outbound shipments of the
lucts processed therefrom being made *via* its
none of its connecting roads was on any bet-
competitive "footing" in respect of the out-
nd traffic in such products, either as processed
seed hauled inbound by the appellee, or from
hauled inbound by any road other than itself,
is, the particular road in fact making the in-
nd haul.

owever, the appellee, by its tariff No. 81,
in 1938 and here under consideration, did
e just such a provision as described, that is
ay, it extended the provision of its earlier
ff, offering the cut-back reduction in inbound
s on seed when the outbound shipments of the
lucts are made via its line, to apply even
gh the inbound shipments of seed to the mill
t were carried by another road (R. 60). It
this application of the appellee's tariff which
Commission condemned as violative of the
It was not condemned on the ground that
ates, minus the refund made to the shipper,
either unreasonable or unjustly discrimi-
ry or preferential, but because the tariff pro-

vision, whereunder such refund—working the rate reduction—was made, was unlawful in violation of section 6 (4), 6 (7), and 1 (6) of the Act.[3]

In its first report the Commission dealt largely with the appellee's tariff in its effect on the joint outbound rates through which the appellee reached the marketing destinations. It there said that the effect of it was to reduce the lawfully published outbound rate without the concurrence of other carriers participating in the outbound haul; that in view of section 6 (4) of the Act, the appellee, acting alone, could not law-

[3] The provisions of the Act involved are given in full in the appendix to the Commission's earlier brief.

Section 6 (4) requires that the several carriers which are parties to any joint tariff shall be specified therein and that each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission.

Section 6 (7) is the provision of the Act which forbids the carriers from engaging in any transportation unless the rates and charges covering same have been filed and published in accordance with the provisions of the Act; forbids any departures whatsoever from such rates or charges; and provides that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

Section 1 (6) makes it the duty of all common carriers, subject to the Act, to establish, observe, and enforce just and reasonable regulations and practices affecting classifications, rates or tariffs, and prohibits and declares unlawful every unjust and unreasonable classification, regulation, and practice.

fully reduce such joint rates (R. 62); that the refunds held out by the appellee constituted a "device" by means of which the appellee refunded a portion of the joint outbound rates in violation of section 6 (7) of the Act (R. 65); and that the granting of an *alleged* allowance to the shipper notwithstanding that he performs no part of the transportation service, as the result of which he obtains the outbound transportation at less than the rates lawfully in effect, constituted an unreasonable practice in violation of section 1 (6) of the Act.[4]

In its final report the Commission dealt particularly with what was the appellee's principal justification in the second proceeding, saying in substance (R. 7) that the justification offered by the appellee for its tariff No. 81 was that it was

[4] Tariff No. 81 became effective without suspension but, it being later criticized by the Commission's Bureau of Tariffs, the appellee filed "proposed" Tariff No. 83 to take its place, which was suspended and was the tariff dealt with by the Commission's first report (Commission's 1st Brief, pp. 5-6). The only differences between this proposed tariff and tariff No. 81 were that the "cutbacks" were termed *allowances* instead of refunds and, instead of being specifically provided for on the inbound shipments of the other roads, were in effect provided for on any inbound shipments moving *via* rail (R. 58). As stated in the Commission's final report, dealing with tariff No. 81 (R. 6): "There is no difference in substance and effect of the tariffs. Each of them provides a cut-back to the shipper of outbound cottonseed products from the mill point upon surrender of inbound freight bills of other carriers for the transportation of cottonseed from origin to the mill point in settlement of claims."

primarily a local tariff publishing rates and rules governing transit privileges;[5] that it published no rates on the movements, the rates both inbound and outbound being published in tariffs, local or joint, governing the movements; that, instead, it incorporated a transit privilege which, by adjustment through claim channels, equalized the net charges to shippers; that the privilege was granted at the appellee's sole expense and for the sole purpose of equalizing the net cost to the shipper of the outbound movements of the products from mill points to destinations;[6] that, in short, its tariff refund was only a means to equalize with the rates over routes of competing carriers result-

[5] Appellee apparently relies largely on *Central R. R. of N. J. v. U. S.*, 257 U. S. 247, shown not to be applicable by the Commission's first report (R. 63) and dealt with in the Commission's prior brief (pp. 12, 13, 41–43). In this connection the appellee's brief in this Court states (19) that the tariff grants the shipper a transit privilege "to permit his election of routes over which joint rates are in effect, the cost or burden of the privilege being upon appellee alone from its general revenues." There are no joint rates in effect from origins of the seed on the other roads through the mill points and via the appellee to final destinations. This appears from both reports (R. 10, 63) and, therefore, it is clear that the statement has reference to the joint outbound rates on the products to which the brief also refers (p. 6). But it requires no "grant of privilege" from the appellee to give the shipper the benefit of these rates, since they are already applicable.

[6] The rates on this movement, namely, the joint outbound rates, the appellee apparently concedes would be affected by its tariff and, in fact, its complaint alleges that its "effect is to reduce the outbound rate on cottonseed products to meet a competitive situation * * *" (R. 3).

ing from their cut-back tariffs the net charge to the shipper as made up of the rate for the inbound movement of seed to the mill point (of connecting roads)[7] and of the rate for the outbound movement of products to destination over routes of the appellee and its connecting lines; and that the resultant net charge is identical with that available over routes of competing carriers (R. 7–8).

After outlining this justification by the appellee of its tariff, the Commission gave consideration to testimony (R. 8–9) describing its operation with respect to an inbound rate of a connecting road, the Y. & M. V., and outbound rates over a through route from a country origin on the Y. & M. V., to an ultimate destination reached both over the Y & M. V., and under joint outbound rates via the appellee. While, in giving this testimony, the witness clearly showed that the appellee's only participation in the through route was as initial carrier in the outbound movement from the mill point and under joint outbound rates, he at the same time also insisted, in effect, that the "privilege" granted the outbound shipper by the appellee's tariff was not different than that given by

[7] Since that part of the tariff which was in issue was its provision (Item 5 (b), R. 6–7) for a rate refund by the appellee on seed from origin on, and hauled inbound to the mill points by, its connecting roads, the appellee was not, of course, included in the inbound "leg" of the through routes; it was included only as intermediate carrier—the initial carrier in the outbound "leg."

the tariff of the Y. & M. V., both refunding to the outbound shipper the difference between the Y. & M. V.'s local inbound rate and the cut-back rate, termed by the witness "a fictional rate." The insistence of the witness here that the appellee's tariff operated the same as that of the Y. & M. V., and that both were fictional was, apparently, to give support to the appellee's contention (hereinafter described) under the decision in *Atchison, T. & S. F. Ry.* v. *United States*, 279 U. S. 768.

After outlining the appellee's general justification and, directly following the witness' testimony (R. 9), the Commission stated and found that the appellee was not a party to the inbound rates on seed from points on its connecting roads and no other railroad was a party to its tariff No. 81; that, while the refunds or allowances held out in its tariff were identical in amount as those of the other roads, the difference in the appellee's practice and that of the other roads was that it made an allowance on *seed* that did not originate on its line and absorbed the allowances so made out of its proportion of the outbound rates (on the products) to which it was a party. Following this, the Commission further discussed the appellee's contentions and, in connection with its contention under the *Atchison Case*, *supra*, which was to the effect that it had the right, when an outbound carrier competing for the outbound products to offer the same concession as did the connecting road or roads, originating and haul-

ing the seed inbound to the mill point, it (the Commission) said, that, while the legality of the tariffs of the connecting roads was not in issue, it considered the distinction they made to be important, namely, that the appellee's tariff

> "attempts to name rates for account of their lines without their concurrence whereas their tariffs apply solely on shipments of cottonseed which they transport over their lines to the mill point."

Following its outline of the appellee's justification of its tariff as a transit privilege and testimony of the witness, its findings as to the appellee's practice and discussion of contentions and other matter just mentioned, the Commission referred to certain of the provisions of section 6 (1) of the Act in their application to the appellee's tariff, saying, among other things, that (R. 10)—

> "Where no joint rate over the through route has been established, as in this case, the several carriers in such through route are required to file the separately established rates applicable to the through transportation. The form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1) and (4) of the act. The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the Act."

The transit privilege, advanced as the appellee's principal justification, that is, the above-described tariff means (or the provisions constituting the means) adopted by the appellee to equalize the rates over routes including its line, it is plain, is the form and manner of tariff publication which the Commission found did not conform to the requirements of section 6 (1) and (4). There being no joint rate over the routes from origins on the connecting roads through the mill points and via the appellee to marketing destinations, the inbound local rates of the connecting roads and the joint outbound rates to which the appellee was a party met the requirements for separately established rates.* There is no question but that they are lawfully established (R. 8), and they could not be lawfully displaced by provisions such as described in appellee's individual tariff (R. 7), either as amounting in practical effect to the establishment of the appellee as an intermediate line in through routes and joint rates with its connecting road or roads, or, on the other hand, as effecting a reduction in the joint outbound rates down to a proportional basis (Prior Br., pp. 16, 40–41), which latter the appellee seems to admit and, in fact, alleges is what is done by its tariff No. 81 (R. 7, 3). The ac-

*These rates are "locals" in the sense that they apply to local as well as through transportation, but a combination through rate may be made up wholly of locals, or wholly of proportionals or combinations of both. *St. Louis S. W. Ry. Co.* v. *U. S.*, 245 U. S. 136, 139.

complishment of either of these things by direct means requires not only the concurrence of participating carriers (*Central R. R. of N. J. v. U. S.*, 257 U. S. 247, 255; R. 63; Appellee's Br. 6), but also tariff provisions conforming to what is in such case expected and required by the Act and necessary for its administration. This being so, it may be said that the accomplishment in practical effect, as here, of the same, or much the same, things by indirect means would quite certainly result in violations of the Act; and the fact that the appellee's tariff has here had such result can, it is believed, be readily shown.

The Inbound Rates of the Appellee's Connecting Roads

In its determination that the appellee's tariff was unlawful, it is plain that the Commission had to give consideration first to its provision for reduction, by way of the refund, in the inbound rates of its connecting roads. This provision being express, if the Commission could have given it legal application as worded, it would not have been necessary to look beyond to any other rates. However, it does not follow from the fact that the Commission could not give it legal application, or any effect whatsoever, on the rates to which it was directed, that the provision itself could only be violative of the Act's requirements if, with respect to some other rates, it were determined that it did effect illegal changes. The consideration that a departure from the joint outbound rates is

in fact effected by the tariff provision is, doubtless, the consideration of primary importance in the case in view of the policy of the Act in that respect. Nevertheless, there are issues here involved and purposes of the provisions of the Act in question quite apart from the actual effect of the tariff on rates; and these are specially important to the workable administration of the Act, for clearly tariff provisions cannot stray far afield from the requirements of the Act, set up to govern them, without consequences extending to the administering of the rate provisions throughout the Act. That this is so is well illustrated by this case. The appellee here alleges that the rates resulting from its tariff are entirely reasonable and nondiscriminatory and, apparently, believes that any authority to order its tariff canceled must be bottomed on findings to the contrary. At the same time it alleges that its tariff publishes no rates of inbound roads and further that it publishes no joint outbound rates although it admits that its effect is to reduce those rates. In these admitted circumstances it is plain that the Commission would be confronted with an unworkable situation in any attempt to apply to the rates resulting from the appellee's tariff the provisions of sections 1, 2, 3, 15 (1), or any other of the rate provisions of the Act. In undertaking to do so, it would, of course, be looking beyond the inbound rates; and, in this connection, it should be kept in mind that it would not be considering the

question of the legality of the tariff as such but, in conformity with the appellee's suggestion, would be accepting the legality of its effect on the joint outbound rates and, therefore, would simply be looking into the rates resulting from the tariff to determine whether they were reasonable and nondiscriminatory. If, however, determining to the contrary—that is, if simply determining that such rates were unreasonable and discriminatory—without consideration of the tariff provisions as such, that would call for an order requiring a different cut-back to be carried out by the indirect and illegal means provided for in the tariff including the sanctioning of it as a cut-back in the inbound rates of the other roads. Of course, the most unworkable feature of the appellee's tariff in any such proceeding would be with respect to the joint outbound rates which are illegally affected and the Commission would be ignoring, but even assuming that the tariff would have valid operation on the joint outbound rates, if directly provided for, it is still plain that the Commission would not be expected to sanction it as its stands. Whether, as here, it was an essential part of the appellee's plan or whether that was not the case, the provision is in conflict with the Act's requirements and its proper administration and the motive behind it would not seem essential in such case before requiring its cancellation.

Another angle involving particularly the inbound rates of the other roads, although also involving the effect of the tariff on the joint outbound rate, is that the publishing of the cut-backs, not simply as in amounts based on the inbound rates, but as in fact reductions in those rates, was essential to the appellee's plan of tariff publication. While it was necessary for the tariff to use the inbound rates and shipments as a basis for the rate equalization effected, it was not, of course, necessary for that purpose to publish the cut-backs as reductions in the rates themselves. The necessity for that appears in the appellee's brief in this Court, in which it very frankly states (pp. 6–7), as it also did before the Commission, that its reason for adopting its plan of tariff publication was that the alternative of seeking to have the joint outbound rates established on a proportional basis would require a complex publication of rates and many concurrences, and, further, that the question is not whether some other plan would accomplish the same results but whether its present tariff is lawful. However, all, or substantially all, that the appellee has advanced in support of its tariff is that it is a transit privilege, that it is necessary to meet the competition of the cut-back tariffs of the transporting roads and does not discriminate against shippers. The latter defense simply clouds the issues. The reports make very plain that the Commission has

never considered that the appellee's tariff resulted in any different rates, or "charges" than those available to shippers under the cut-back tariffs of an originating road. But any inference that the appellee's tariff supplies shippers with rates not already "at hand," is, of course, contrary to the fact. It simply makes rates which are already available to the shipper further available over routes including the appellee's line. As for the appellee's other justification of its tariff, the first one, that it constitutes a transit privilege within the ruling of *Central R. R. of N. J.* v. *United States, supra,* need not be discussed again as it has already been referred to in this brief and was dealt with in the Commission's prior brief (p. 12, 41). The second one, that its tariff, providing for cut-back reductions in the inbound rates on seed of an originating and transporting road, is necessary to meet the cut-back tariff of such road in competing for the traffic in the outbound products, is not a sound defense. The defense of competition could not make its tariff a legal tariff either as "naming" the rates of other roads or as establishing the cut-backs as a valid change in the joint outbound rates. This the appellee would seem to admit. Its bill of complaint alleges (R. 3) that its tariff *effects* a reduction in the outbound rates and it nowhere contends that it makes the change in the rates themselves, but appears clearly to admit, if not to allege, the contrary (R. 8). And its position has consistently

been that its "tariff publishes no rates for application on the inbound movements" (R. 8).

In connection, however, with this latter concession of the appellee, it will be seen that it embraces the position that its tariff does not even publish rates on its own inbound hauls of seed, which brings to mind the testimony of its witness before the Commission (R. 9) that the cut-back tariff of the Y. & M. V., applying on an inbound shipment hauled by itself nevertheless published a fictional rate. In doing this, it will be recalled, the witness was, by direct inference at least, placing the Y. & M. V's cut-back tariff in the same category as the tariff of the appellee which purported to publish a cut-back reduction in the same rate; that is, the inbound rate of the Y. & M. V. While the appellee's cut-back tariff is, in truth, fictional, that of the Y. & M. V. and its own, when transporting the inbound shipment, are fictional only in the sense referred to in the *Atchison case, supra*, the *Central R. R. of N. J. case, supra*, and still other earlier cases. The appellee doubtless appreciates the distinction and, in any event, its tariff would not be shown to be legal even were the tariffs of the other roads equally fictional and equally invalid in other respects. However, the reference here to the "play" made by the appellee on the word "fictional" is not so much intended to emphasize the manifest difference between the two tariffs, classed by the appellee as "fictional", but rather

size that the express publishing by the tariff of the cut-backs as applying on nd rates of other roads was essential to plan. As alleged by the appellee, the of having the joint outbound rates l on a proport nal basis (by a complex lication calling for the concurrences of ing carriers) was the occasion for its ring about such equalization, or reduc- 7, 3), in those rates by the tariff plan ed. It could not publish the cut-backs applying on the joint outbound rates ing it in the form and manner required 6 (4); that is, by a tariff specifying of the participating carriers and ob- eir concurrences, and, therefore, it em- individual tariff" publishing the cut- pplying on the inbound rates of its con- ads. The "naming" of the cut-backs g on the said inbound rates was, there- tial to, and inseparable from, the ap- ible plan of tariff publication to effect n in the joint outbound rates, but the xplained by the appellee itself, seems, re, to constitute a concession of viola- tion 6 (7) practically in the words of

alleged by the appellee, this tariff is not a joint 19), its use is distinctly defeative of the pur- on 6 (4) because as found by the Commission ng in form and manner to the requirements of 6 (4) or section 6 (1).

the statutory prohibition. The appellee is, of course, mistaken in its view (Br., 24) that the statute forbids only those rebates which are "secret."

The Joint Outbound Rates

The findings in the Commission's first report of the violations of the Act effected by the operation of appellee's tariff on the joint outbound rates have already been referred to and were dealt with in the Commission's prior brief (pp. 32–40). They are explained in detail in the first report together with full statement of underlying facts and circumstances furnishing the background for the final report. The said findings are plainly adopted and embodied in the findings of violations of the same provisions of the Act found by the Commission in its final report (R. 10, 11). The appellee's justification of its tariff as a transit privilege granted at its expense and "solely for the purpose of equalizing the net transportation cost to the shipper of the product from mill point to destination" is set forth in the Commission's final report (R. 7) describing the appellee's justification of its tariff as a transit privilege, or tariff means for equalizing the rates. The reports specially important findings are directed to the tariff's operation both in respect of the inbound and joint outbound rates, that is, to the tariff's operation as a whole (R. 9). Those findings are substantially that the appellee is not a party to

the inbound rates on seed from origins on its connecting roads and that *no other road is a party to its tariff* providing for the refunds; that, while the refunds, or allowances, are exactly the same in amount as those of the other roads, the difference between its practice and that of the other roads is that it makes an allowance on seed that does not originate on its own line and *absorbs the allowances so made out of its proportion of the outbound rates to which it is a party.*

The finding that no other road is a party to the appellee's tariff offering the refunds, it is clear, refers both to the inbound roads and the roads, parties with it to the joint outbound rates. That the finding that the refunds "are exactly the same in amount," is made in recognition of the fact that they are used to effect the reductions in the joint outbound rates, already explained by the Commission in outlining the appellee's "justification," is made plain by the finding that they are absorbed out of the appellee's proportion, or division,[10] of the joint outbound rates *to which it is a party.* And, of course, it follows from the

[10] The appellee's justification states that the expense of the equalization is borne by it (R. 7) and its brief (p. 19) alleges that such expense is borne out of its general treasury. Assuming this latter to be the fact, it would show all the more clearly that the refunds were used simply "to buy traffic." However, the statement is not readily reconcilable with the appellee's testimony (R. 68) that the tariff is profitable to it, for it seems clear that the appellee must look for any net profit to its divisions from the joint outbound rates.

fact that the refunds were absorbed out of the appellee's divisions that they were not *absorbed* as valid reductions from the rates, the other participating roads not having concurred in the appellee's individual cut-back tariff. As above stated, the final report was written in reliance on the stipulation that the record and findings of fact in the prior proceeding be made a part of the record in the final proceeding (R. 6), and it was in light of such background that the above findings were made and also the succeeding findings of violations of the provisions of the Act (R. 10) and the ultimate findings (R. 11). The findings of violations of the Act were made after summarizing section 6 (1), and were that:

> "The form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1) and (4) of the Act. The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the Act."

As above indicated, the form and manner of tariff publication to which the Commission refers is the plan of tariff publication employed by the appellee. As there explained, the appellee adopted its plan of tariff publication because of the difficulties in having the outbound rates established on a proportional basis, that is, the requirement, in order

to conform to section 6 (4), of a complex tariff publication specifying the participating carriers and requiring their concurrences. The appellee, therefore, could not publish the cut-backs as directly applying on the joint outbound rates without doing it in the form and manner so required by section 6 (4), that is, by a tariff specifying the names of the participating carriers and obtaining their concurrences, and therefore, it employed its individual tariff publishing the cut-backs as applying on the inbound rates of its connecting roads, when the movements of outbound products were made *via* its line. This, it is plain, supplied warrant for the Commission's finding that the tariff did not conform to the requirements of section 6 (4). As for the finding that the tariff did not conform to section 6 (1), it has already been pointed out that the inbound rates of the connecting roads and the joint outbound rates met the requirements of section 6 (1) for separately established rates in the absence of a joint rate. The appellee's tariff could not displace these rates either in its express provision publishing the cut-backs as reductions in the rates of the inbound roads or in its indirect application of effecting the reductions in the joint outbound rates. And the reason that it could not do so was because it did not meet the requirements of that paragraph, even remotely. While section 6 (1) is referred to in the first report, it is not there found that the tariff did not meet its requirements, but it is so

found in the final report and it is clear that it applies both to the express operation of the tariff on the inbound rate and its indirect effect on the joint outbound rates.

The tariff, in its express "naming" of the inbound rates of other roads, does not fit into the violation of section 6 (4) as well as it does in its effect on the joint outbound rates. And yet it is indisputably defeative of the requirements and purposes of both section 6 (1) and (4), for the only way either of those paragraphs contemplate that one railroad may include itself in the published rates of another is by a joint tariff publication conforming to section 6 (4). The Commission's finding that the refunding, or attempted refunding, of the rates of another road was a tariff practice made unlawful by section 1 (6) applies, of course, to the tariff in its express application to the inbound rates. This, however, cannot be dismissed, as appellee would have it, for absence simply of the word "unreasonable". A finding under the paragraph of the Act in question that a practice is unlawful both conveys and carries the meaning that the practice is found to be unreasonable. This leaves for consideration only the finding of violation of section 6 (7), and this finding leaves no doubt that the tariff in its effect on the joint outbound rates is embodied in the report's findings of violations of the Act, for the reason that it is through the joint outbound rates that this ultimate violation is worked. As explained

above, the tariff's express "naming" of the cut-backs as applying on the inbound rates was essential to its plan of tariff publication but the ultimate departure from the lawfully published rates was effected and worked in the joint outbound rates.

(2) Assuming Question (1) to be answered in the affirmative, would the cancellation of the appellee's tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes?

Since the above question of the Court applies only on the assumption that the appellee's tariff plan of effecting reductions in rates is illegal as found by the Commission, it is understood to call primarily for an expression of views as to the steps or procedure which would be open to the appellee to establish itself in routes carrying rates enabling it to compete on even rate terms for the outbound traffic in cottonseed products. The appellee points in its brief (p. 6) to the method open to it by tariff publication designed to establish the joint outbound rates to which it is a party on a proportional basis. Whether the difficulties in meeting the appellee's need for market outlets by voluntary means are as discouraging as pictured is probably a question that had best be left to counsel for the appellee and the intervening roads. In the matter of steps open to the appellee before the Commission, consideration

will be given first to a complaint proceeding for the establishment of through routes and joint rates under section 15 (3). Cf *United States* v. *Mo. Pac. R. R. Co.*, 278 U. S. 269. In the latter case the complaint was brought by the Ft. Smith, Subiaco & R. I. Railroad. The complainant was a so-called "weak carrier", whereas the record does not indicate that the appellee would be classed as such. The right to bring such a complaint, however, is open as much to the appellee as any railroad. And, since section 15 (4) has now been amended to preclude the establishment of through routes for purpose of assisting any carrier in meeting its financial needs, no advantage would, in any event, attach to a complainant having the status of so-called "weak carrier."

While section 15 (4) is the provision embodying what is commonly referred to as the "long-haul" right of an originating carrier, it is in fact a paragraph limiting the Commission's authority to establish through routes involving such long-haul rights to situations or circumstances where certain prescribed findings can be made. However, the appellee's reliance upon the decision in the *Atchison Case, supra,* for its contention that the outbound traffic in products processed from seed hauled inbound by its connecting roads is "free traffic" for which it has the right to compete on equal terms as to rates is predicated on the assumption that here as in that case the "long-

haul" right of the originating roads would not exist. Accepting that assumption as correct, it would follow (subject to consideration to be later mentioned) that the restrictions imposed by paragraph (4) on the Commission's authority under paragraph (3) would be removed and it could, similarly as in any case, establish through routes upon finding the same to be in the public interest.

While the appellee's general position that the outbound traffic here involved is "free traffic" is probably correct, if it is proceeding on the assumption that an originating road is not within its rights in reducing its rates for competitive reasons, that meaning is not to be found in the term "free traffic" under the decision in the *Atchison Case, supra.* There, as pointed out in the Commission's prior brief (pp. 44–47), the Atchison, in exercise of its asserted right under section 15 (4) to withdraw from a through route which short-hauled it, filed an inbound rate on grain higher than its inbound local which was conditioned to apply in case the outbound products of the grain were reshipped over the line of its competitor, the Kansas City Southern. In proposing the rate the Atchison made clear that it was not filed as a just and reasonable rate but as a rate made purposely high to prevent the outbound traffic from moving over the line of its rival, it taking the further position in this connection that the Commission was without authority to order the rate canceled as unreasonable, for, to do so,

would deprive it of its long-haul right. When considering the meaning of the term "free traffic" as used in the *Atchison Case, supra,* it is this contention of the Atchison that must be kept in mind. For it is clear that this Court, in overruling the contention by sustaining the Commission order did not hold that the Atchison could not have used the usual competitive means to hold the outbound traffic to its line, as, for example, a further reduction in its rates. All that it held was that the Atchison could not file a rate made purposely high to prevent the outbound traffic from moving over the line of its rival and, by doing so in reliance on its long-haul right, take from the Commission its authority to pass on the reasonableness of the rate and, if finding it unreasonable, order it canceled. This holding was based in part on the ground that since the inbound and outbound movements were separate and distinct, there was no through movement and, therefore, no special right in the carrier by virtue of paragraph (4), and in part on the further and important ground that it was, in any event, within the Commission's authority to pass on the reasonableness of the rate proposed.

In short, there is nothing in the *Atchison* decision to warrant the thought that, in the situation here, an originating road, just because it is such, may not reduce its rates in reliance upon its usual competitive right to do so. It cannot place them outside the Commission's regulatory authority by rates made so low for competitive reasons that

they would be "destructively low" (this term being used only for purposes of contrast) any more than the Atchison could achieve such result by its prohibitively high conditional inbound rate, but within the bounds of rates, neither unreasonably low nor unjustly discriminatory, there would seem to be no reason to believe that such a road is deprived of the right had by any road to establish and maintain competitively low rates simply by reason of the fact that it cannot assert its special right under section 15 (4).

Using the *Atchison Case* for comparison here with the inbound cut-back rate of an originating road, the Atchison's proposed inbound rate was higher than its local inbound rate and the tariff made it applicable if the products of the grain were shipped outbound over the line of the rival road. The Court's holding in these circumstances that the Atchison had no right to recapture the traffic and that the outbound products were "free traffic" would seem to mean simply that the Atchison could not rely on its paragraph (4) right as precluding the Commission from ordering the proposed inbound rate cancelled as unreasonable.[11]

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[11] The statement in the *Atchison Case*, *supra* (p. 776), that "To call the rate proportional is misleading" is shown by a footnote to refer to the fact that instead of being lower, it was higher than the locals. This is further shown by the statement at pp. 773–774:

"* * * Moreover, to make an additional charge for having brought merchandise into a city if it should after-

In contrast, the inbound cut-back rate here is a rate lower than the local and made to apply if the products are shipped outbound over the line of the road hauling the seed to the mill point. The "recapture" of the traffic in such case, therefore, is not attempted by virtue of a special right or of any right, except that to maintain rates below the local rate, both on the principle that they apply on a through movement and for competitive purposes, including the purpose of "recapturing" the outbound traffic for movement over the line of the road making the inbound movement. But such "recapture" is not the same as in the *Atchison Case,* for all that is asserted is the right to maintain rates lower than normal for competitive purposes, subject to the Commission's authority to require them increased, if unreasonably low. The traffic is "free traffic" for which the appellee or any outbound road may, similarly as the outbound carrier in the *Atchison Case, supra,* (772), compete by meeting through a reduction in their outbound rates the cut-back in inbound rates of the rival road.[12]

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wards be shipped out, is on its face unreasonable. And it is discriminatory to make that additional charge only if the outbound shipment is over one of several possible railroads * * *."

[12] Such cut-back tariffs are not new. They are employed very extensively in certain Southern States and are asserted to be particularly well fitted for certain traffic and to meet truck competition. *Lawrenceville Cooperage Co.* v. *Akron, C. & Y. Ry.,* 235 I. C. C. 155, 163 (226 I. C. C. 773, 790).

The above, it is believed, shows that the difficulties confronting the appellee are not because the "recapture" of the outbound traffic here is in any way like that referred to in the *Atchison Case, supra,* but is because, unlike the rival outbound road in that case, it does not reach the marketing destinations by its own rails. The situation is therefore that the steps open to the appellee are, either to secure the cooperation of the other carrier parties to the rates, or to invoke the remedies given it by the Act. Of these the remedy of seeking the establishment of through routes and joint rates seems preferable to such others as there might be for the reason that, with the routes as well as rates in issue, a better perspective of the general situation is had, and perhaps particularly because the one factor through rate would "spread" the effect of meeting the competitive rates involved.

In undertaking such a proceeding, it seems likely that considerations of the Commission's authority would be involved. As above said, if the circumstances at the mill points here are the same as involved in the *Atchison Case, supra,* then section 15 (4) does not apply as a restriction upon the Commission's authority under section 15 (3), but under that decision there would still remain the question as to whether the through traffic would be of a kind upon which the Commission's through route and joint rate authority might be

predicated. It is the opinion of counsel that the Commission's authority would attach. With such situations embodied in the rate structure throughout the country, now and for many years past, it would seem that the section 15 (3) procedure was applicable. And with the paragraph (4) right of the carriers in any case eliminated in such situations, the question would appear to be one simply of procedure. In any event such procedure may be assumed to apply in further answering the Court's questions.

Probably the real difficulty is not because of the paragraph (4) right of the railroads, which, as above stated, is simply a limitation upon the Commission's authority under section 15 (3). The real difficulty, if it may be called such, arises from the fact that in any situation involving the right of the railroads to meet competition by reduced rates, the Commission's authority is quite different than that which it has with respect to the maximum reasonableness of rates. This the Court well knows and it is mentioned here because, in giving consideration to the fairness of the situation to the appellee and the effectiveness of the remedies available, the question seems to narrow down to such competitive right of the carrier and the policy of the Act on which it rests which is, subject to well-known limitations, to leave the carriers free to compete, this because of the benefits of such competition to shippers

generally. *Texas & Pacific Ry.* v. *United States*, 289 U. S. 627; *Texas & Pacific Ry* v. *Int. Com. Comm.*, 162 U. S. 197. The fact that the question does narrow down to such competitive right, or very largely so, disputes of course the appellee's thought that it is confronted with a monopolistic situation. This can be further demonstrated by the facts in this case.

It appears from the record that, at one time at least, the railroads here concerned had concluded that their cut-back rates had outlived their usefulness except for one road, the subsidiary of the Illinois Central, referred to in the Commission's report as the Y. & M. V. [illegible] the particular territo[illegible] served by that road the continuance of the cut-back rates were essential to enable the road to meet water as well as truck competition, and it, therefore, stood out against the other roads, insisting upon maintaining its cut-back rates, which in turn compelled the other roads to do the same. This is clearly the opposite of a monopolistic situation and the shipper benefits "all down the line."

The above considerations bear especially on the system of cut-back rates as it stands. The Commission is without authority to prescribe other than reasonable rates, but, in the assumed section 15 (3) proceeding, it would be prescribing rates for the through movements. The decision in *Virginian Ry.* v. *United States*, 272 U. S. 658, shows that the rates over the existing routes, even though made

under stress of competitive conditions, may be properly considered in evidence but to be weighed, of course, together with other evidence, such as ton-mile and car-mile earnings volume of traffic and the like.

It is possible that a proceeding such as the above might result in the abandonment of cut-back rates by the railroads concerned, although, if confined to what now in practical effect exists, there would be no difference except that the appellee would not be bearing the sole expense. There would be, and is now a route situation favoring routes via the appellee, although not at all points and not necessarily unjustly so, particularly if the public interest in the route were shown. On the other hand, if it did prove necessary to extend to other routes a general proceeding might follow, although not necessarily a proceeding under section 15 (3).

(3) What considerations of law, procedure, or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustmet of rates as between respondent and other carriers?

If the Commission's findings of violations of the act are upheld, it is the view of counsel that the tariff would be required to be cancelled because of the policy of the act against departures from the published rates and because the plan of tariff publication used by appellee should not be permitted

even temporarily in view of the possible effect on the general railroad rate structure.

(4) Have the courts power to require the Commission to take such procedure?

It is counsel's view that, if the Court upholds the Commission's finding of violation of section 6 (7), the statute contemplates its cancellation. Further answering the question, while an order requiring such proceeding would not necessarily control administrative judgment in deciding the case, there is a complex and intricate rate situation existing which it is believed would involve administrative judgment in determining whether to institute an investigation upon the Commission's own motion.

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed with directions to dismiss the bill for want of equity.

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